IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1404, ~~Misc.~~

DO-RIGHT AUTO SALES, TIMOTHY O'BRIEN, THOMAS O'BRIEN, d/b/a DO-RIGHT AUTO SALES, Individually and on behalf of all others similarly situated,

Petitioners,

vs.

THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, and each Circuit Judge in regular active service thereon,

Respondents.

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE PETITION FOR WRITS OF MANDAMUS AND PROHIBITION AND PETITION FOR WRITS OF MANDAMUS AND PROHIBITION

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Oral Argument Requested

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ISSUE PRESENTED FOR REVIEW

Whether the extraordinary relief of writs of mandamus and prohibition sought in this Honorable Court to compel the Honorable United States Court of Appeals for the Seventh Circuit to reconsider its denial of Petitioners' prior "petition for Writ of Mandamus" against the Honorable Joel M. Flaum, Judge of the United States District Court for the Northern District of Illinois and Michael J. Howlett, Secretary of State of Illinois, is appropriate?

PREFATORY STATEMENT

Respondent has been informed and believes that in the petition at bar the Solicitor General is representing the United States Court of Appeals for the Seventh Circuit and the Judges in service thereon and that the Solicitor General's response will directly address the issue of the constitutionality of Rule 28 of the United States Court of Appeals for the Seventh Circuit. This response filed on behalf of Michael J. Howlett, Secretary of State of Illinois is therefore limited to the question of whether petitioners should be granted the extraordinary relief which they seek in the instant case.

STATEMENT OF THE CASE

Do-Right Auto Sales is an Illinois Corporation located in Blue Island, Illinois. Timothy O'Brien was the sole incorporator and is the president of said corporation. As is required by Illinois Statute, Do-Right holds a Dealers Certificate of Authority (hereinafter certificate) issued by the respondent, Michael J. Howlett, Secretary of State of Illinois. This certificate entitles the holder to engage in the business of a dealer in automobile parts and rebuilt automobiles.[1]

On or about July 17, 1975, petitioners received an order of revocation from respondent stating that said certificate had been revoked on July 2, 1975. This order of revocation was erroneously issued through administrative error and was never intended to be an order of revocation, but rather a notice of hearing (see affidavit of Jay L. Mesi reproduced in Appendix p. a1. The original affidavit was filed as an attachment to Respondent's Answer in Seventh Circuit case number 76-1022).

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1. There is currently some question as to whether Do-Right Auto Sales Corp. existed between July 1, 1974 and May 20, 1976. On December 21, 1974 said corporation was subjected to involuntary dissolution effective July 1, 1974 for failure to file an annual report and pay an annual franchise tax. However, in May, 1976 Do-Right Auto Sales Corp. applied for reinstatement and was reinstated on May 20, 1976. The above facts present the questions of whether the certificate involved lapsed and became null and void because the holder ceased to exist, and whether the pending proceedings concerning this certificate should be considered revocation proceedings or proceedings on an application for issuance of a new certificate. However, for purposes of this response it is assumed that the certificate holder is and was an existent corporation during the period in question and the certificate did not lapse and become null and void.

After receiving the above mentioned order, petitioners did not immediately request a hearing from respondent, but rather applied for and obtained a temporary restraining order from the Federal District Court on July 23, 1975 (Case No. 75 C 2421). The order enjoined respondent from revoking petitioners' certificate without a prior hearing and required petitioners to request such a hearing. At petitioners' request respondent scheduled a hearing and agreed not to revoke the certificate pending its outcome.

The hearing was commenced on August 21, 1975 and is still pending. After the first day of the hearing petitioners filed a motion in the Federal District Court requesting: 1) that the order which required them to request a hearing be vacated; and 2) a temporary restraining order enjoining respondent from revoking their certificate or holding to determine if their certificate should be revoked. On September 29, 1975, the Court vacated the order requiring them to request a hearing and denied their motion for a temporary restraining order. At the same time the Court ordered respondent to respond to petitioners' motion to convene a three-judge district court. After respondnt filed a memorandum in opposition to petitioners' motion for a three-judge district court, the District Court, on December 19, 1975, denied the motion.

On January 8, 1976, petitioners filed, as an original proceeding, a petition in the United States Court of Appeals for the Seventh Circuit (Case No. 76-1022), seeking a writ of mandamus directing the District Court to convene a three-judge court. In said petition the petitioners cited a number of authorities for their position, including an unpublished order in the case of *Valentino* v. *Lynch* (7th

Cir., Case No. 73-1089, June 8, 1973). Respondent filed a motion to strike reference to this unpublished order pursuant to Seventh Circuit Rule 28, and an answer as to the balance of the petition.

On February 2, 1976 the Seventh Circuit granted respondent's motion to strike and further denied the petition for a writ of mandamus. Subsequently petitioners filed the motion which is the subject of this response, seeking leave to file a petition for writs of mandamus and prohibition with this Honorable Court.

ARGUMENT

I.

THE ISSUE OF THE VALIDITY OF SEVENTH CIRCUIT RULE 28 IS MOOT.

It is a well established rule that this Honorable Court does not issue advisory opinions, and that the controversy must be extant at all stages of review. *Preiser* v. *Newkirk*, 422 U.S. 395, 45 L. Ed. 2d 272 (1975); *De Funis* v. *Odegaard*, 416 U.S. 312, 40 L. Ed. 2d 164 (1974). Petitioners attempted to cite an unpublished order in *Valentino* v. *Lynch* (7th Cir. No. 73-1089, June 8, 1973) for the purpose of showing that mandamus is a proper procedure to compel the convening of a three-judge court. While it is submitted that a three-judge court is not required to hear petitioners' claim, if petitioners desire to cite this case they may cite the *published opinion* in the same case which is reported as *Valentino* v. *Howlett*, 528 F. 2d 975 (7th Cir. 1976).

Respondent has not contested the propriety of the procedure of mandamus, but only that in the instant case the use of this extraordinary remedy is inappropriate. It is submitted that neither the unpublished order nor the published opinion in *Valentino* provide authority to substantiate petitioners' request in the Seventh Circuit for a writ of mandamus compelling the convening of a three-judge court. However, if petitioners desire to cite this case they may cite the published opinion. Since everything of substance contained in the unpublished order is also contained in a published opinion, petitioners no longer have a need to cite the unpublished order. Therefore the issue of the validity of Seventh Circuit Rule 28 has been rendered moot, and petitioners' request for an extraordinary writ declaring it unconstitutional should be denied.

II.

PETITIONERS HAVE NO RIGHT TO A THREE-JUDGE COURT, WHICH IS WHAT THEY ARE SEEKING.

The relief sought by petitioners is an extraordinary remedy reserved for really extraordinary causes. *Will* v. *United States,* 389 U.S. 90, 107, 19 L. Ed. 2d 305, 317 (1967). Only exceptional circumstances will justify its invocation and petitioners have the burden of showing that their right to such a writ is clear and undisputable. *Id.* at 389 U.S. 95-96, 19 L. Ed. 2d 310. Petitioners are seeking in essence a double mandamus directing the convening of a three-judge court (a writ from this Court directing the 7th Circuit to reconsider its denial of a writ against the District Court). It is submitted that before petitioners have a right to this extraordinary writ, they have a burden of showing not only that they have a clear and undisputed right to cite an unpublished order, but they also have the burden of showing that if they are permitted to cite this unpublished order they can establish a clear and undisputed right to have a three-judge district court convened. Petitioners have unquestionably failed to meet their required burden.

It is well established that the purpose of convening a three-judge district court under 28 U.S. C.A. § 2281 is to provide procedural protection against an improvident invalidation of a state's legislative policy by a single federal judge. *Phillips* v. *United States,* 312 U.S. 246, 85 L. Ed. 800 (1941); *Gonzalez* v. *Automatic Employees Credit Union,* 419 U.S. 90, 42 L. Ed. 2d 249 (1974). Section 2281 does not contain a policy which liberally allows requests for the convening of three-judge courts, but is to be construed as a provision which is technical in the strict sense of the term and is to be applied as such. *Phillips* v. *United States, supra; Calero-Toledo* v. *Pearson Yacht Leasing Co.,* 416 U.S. 663, 40 L. Ed. 2d 452 (1974).

In *ex parte Poresky,* 290 U.S. 30, 78 L. Ed. 152 (1933) the court held that before a three-judge court may be convened, there must be a substantial claim of unconstitutionality. The Court in discussing what constituted a substantial claim of unconstitutionality stated:

> "The question may be plainly unsubstantial, either because it is "obviously with out merit" or because "its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy." *Id.* at 290 U.S. 32, 78 L. Ed. 153.

Although primarily directed to the standard of foreclosed by previous decisions, the Court affirmed this two pronged test in *Goosby* v. *Osser,* 409 U.S. 512, 35 L. Ed. 2d 36 (1973), and claims have been held unsubstantial which have not been foreclosed. *Sheehan* v. *Scott,* 520 F. 2d 825 (7th Cir. 1975).

In their petition filed in Seventh Circuit case number 76-1022 petitioner claimed that Ill. Rev. Stat. Ch. 95½, §§ 5-501(a)(5) and (a)(6) violated the Fourteenth Amendment to the United States Constitution in that it provided for the revocation of a certificate prior to a hearing. Not only do these challenged statutes not provide for revocation without a hearing, but in the instant case respondent intended to issue a notice of hearing to petitioners. However, due to administrative error an order of revocation rather than a notice of hearing was issued (see Affidavit of Jay L. Messi, Appendix p. a1). After receiving this notice, petitioners applied to the Federal District Court for a temporary restraining order on the basis that the revocation without a prior hearing violated the due

process clause of the Fourteenth Amendment to the United States Constitution. The Court granted the temporary restraining order and further ordered petitioners to request a hearing from respondent. Petitioners requested the hearing and respondent, since he never intended to revoke the certificate prior to a finding at a hearing, immediately scheduled a hearing and agreed not to revoke the certificate pending its outcome.

Even though petitioners have been afforded the hearing which they sought, they are now seeking to enjoin that very proceeding which they claimed was necessary to protect their constitutional rights.

Ill. Rev. Stat., Ch. 95½, §§ 5-501(a)(5) and (a)(6) do not provide the procedure, but rather the basis for revocation or suspension of a certificate. They do not deal with *how* a certificate is revoked or suspended, but rather *why* it may be revoked or suspended. These provisions simply set forth certain grounds or reasons for revocation or suspension of certificates. They, as well as the other subsections of § 5-501, give notice to holders of certificates and state officials as to what is required, what is prohibited, and what is the basis for a suspension or revocation of a certificate. Section 5-501 does not in any way provide for the procedure used to suspend or revoke certificates. Assuming *arguendo* that the procedure of revocation was unconstitutional, it would still not affect the constitutionality of the criteria for revocation set forth in § 5-501. Since in the instant action petitioners' only allegation of a substantial constitutional question which requires a three-judge court is not the basis for revocation, but is limited to the necessity of a prior hearing, they are not attacking the constitutionality of § 5-501, but rather the procedure by which it is implemented.

A three-judge court is not required to hear a claim that a constitutional statute is administered in an unconstitutional manner. *Butler* v. *Dexter*, —— U.S. ——, 47 L. Ed. 2d 774 (1976); *Santiago* v. *Corporation De Renovacion Urbana y Vivienda De Puerto Rico*, 453 F. 2d 794 (1st Cir. 1972). With the exception of the administrative error which was quickly rectified, section 5-501 has not been administered in any way which conflicts with the due process clause. However, even if there was a question regarding the administration of this section, it would not require a three-judge court.

Petitioners' contention that there must *always* be a prior hearing before a right or interest such as a certificate or license may be revoked is clearly erroneous, and their citation of *Goldberg* v. *Kelly*, 397 U.S. 254, 25 L. Ed. 2d 287 (1970); *Bell* v. *Burson*, 402 U.S. 535, 29 L. Ed. 2d 90 (1971); and their progeny is misplaced. While it is not contended that respondent may in the instant case revoke petitioners' certificate without a prior hearing, it is clear that the above mentioned cases do not hold that the state must always grant a hearing prior to revoking or suspending a license or certificate.

In *Goldberg* v. *Kelly, supra,* the Court held that a welfare recipient was entitled to a hearing prior to termination of welfare benefits. This opinion is based on the Court's determination that the recipient had a "brutal need" and, therefore, his interest in avoiding the loss of benefits outweighed the governmental interest in summary adjudication (the only governmental interest advanced was the need to preserve public funds). However, the Court also stated:

> It is true, of course, that some governmental benefits may be administratively terminated without affording the recipient a pre-termination evidentiary hearing. *Id.* at 397 U.S. 363, 25 L. Ed. 2d 296.

In a footnote (footnote number 10) to the above quotation, the Court recognized that where harm to the public is threatened, and the private interest infringed is reasonably deemed to be of less importance, a governmental body can revoke or suspend a right prior to a hearing which is to be held at a later date. (This footnote also contains examples of instances where summary action pending a later hearing is appropriate.) In *Bell* v. *Burson, supra,* the Court stated that due process does not require a prior hearing in emergency situations. In *Goss* v. *Lopez,* 419 U.S. 565, 582, 583, 42 L. Ed. 2d 725, 739 (1975) the Court stated:

> . . . there are recurring situations in which prior notice and hearing cannot be insisted upon . . . In such cases, the necessary notice and . . . hearing should follow as soon as practicable . . .
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> • • •

[Also see *Torriente* v. *Stackler,* 529 F. 2d 498, 502 (7th Cir. 1976); *Hubel* v. *West Virginia Racing Commission,* 513 F. 2d 240, 243-244 (4th Cir. 1975)]

Whether due process requires that a hearing be held prior to revocation depends on the particular facts and interests involved in such case. It would be impossible to provide for every conceivable situation in the statute. As the Court stated in *Goss* v. *Lopez, supra:*

> . . . the interpretation and application of the Due Process Clause are intensely practical matters and that "*[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.*" Cafeteria Workers v. McElroy, 367 U.S. 886, 895, 6 L. Ed. 2d 1230, 81 S. Ct. 1743 (1961). *Id.* at 419 U.S. 578, 42 L. Ed. 2d 737 (emphasis added).

From the above it is clear that petitioners' claim that due process requires the statute to grant in every instance a hearing prior to revocation or suspension has been foreclosed by prior decisions of the Supreme Court. What the due process clause does require in every instance is notice and an opportunity to be heard. This is guaranteed to petitioners by Ill. Rev. Stat. (1975) Ch. 95½, § 2-118. It should be noted that subsection (d) of this Section specifically provides:

> All hearings and hearing procedures shall comply with requirements of the Constitution, so that no person is deprived of due process of law . . .

Therefore, if the facts are such that due process requires a prior hearing, Ch. 95½, § 2-118(d) requires that the opportunity for a hearing prior to revocation of suspension be afforded.

For the above stated reasons, petitioners' claim that the statutes in question violate the Fourteenth Amendment is obviously without merit and is foreclosed by prior decisions of this Court. Therefore it is unsubstantial and does not require the convening of a three-judge district court. Since it is clear that a three-judge district court is not required in the case at bar it is respectfully submitted that it would be inappropriate to issue a writ of mandamus compelling the Seventh Circuit to reconsider its denial of a writ of mandamus directing the convening of such a court.

III.

THE EXTRAORDINARY WRIT SOUGHT IS INAPPROPRIATE IN THE INSTANT CASE.

As previously mentioned, the relief which is sought by petitioners is a truly extraordinary writ which is re-

served for really extraordinary causes; only exceptional circumstances will justify its invocation, and petitioners have the burden of showing that their right to such a writ is clear and indisputable. *Will* v. *United States,* 389 U.S. 90, 19 L. Ed. 2d 305 (1967) U.S. Supreme Court Rule 30. In support of their petition for mandamus in the Seventh Circuit, petitioners cited three opinions and an unpublished order. These cases are inapposite and not controlling in the action at bar.

In *Idlewild Bon Voyage Liquor Corp.* v. *Epstein,* 370 U.S. 713, 8 L. Ed. 2d 794 (1962) a request for a three-judge court was denied. The single judge retained jurisdiction but, in effect, abstained "in order to give the state courts an opportunity to pass upon the constitutional issue presented, although there was no relevant litigation then pending in the state courts." *Id.* at 370 U.S. 714, 8 L. Ed. 2d 796. The Court pointed out that the Circuit Court of Appeals had held that a three-judge district court should have been convened and the District Court interpreted their language as merely dictum and had once again refused to convene a three-judge court. *No writ of mandamus was issued,* but the Supreme Court simply remanded to the District Court. It should be noted that in *Idlewild* the petitioner was effectively out of Court and that in the case at bar the petitioners are proceeding with their hearing and are not out of court. The District Judge has not abstained and is probably awaiting this Court's decision before ruling on the pending motion to dismiss. If he does dismiss then petitioners may raise the three judge court question on appeal. It should also be noted that in *MTM* v. *Baxley,* 420 U.S. 799, 43 L. Ed. 636 (1975) Mr. Justice White in his concurring opinion stated:

> Cases like Idlewild are derelicts and should be expressly cleared from the scene. *Id.* at 420 U.S. 807, 43 L. Ed. 2d 642

In *Cancel* v. *Wyman,* 441 F. 2d 553 (2d Cir. 1971) the Court held that mandamus was a proper remedy and still

they denied the writ, noting that the denial would not prejudice petitioners since if they were to win before the single judge on the non constitutional issues, a three- judge court would be unnecessary, and, if they were to lose they could still raise the denial of a three-judge court on appeal. The Court stated that by denying the writ they conserved judicial resources and at the same time afforded an opportnity for adequate review of a denial of a motion to convene a three-judge court.

Svejkovsky v. *Tamm,* 326 F. 2d 657 (D.C. Cir. 1963) involved a case where both plaintiff and defendant agreed that a three-judge court was necessary. However, the single judge entered a stay pending a decision of this Court in a similar case. The Circuit Court held that the stay was improperly entered by a single judge and he should have proceeded to convene the three-judge court. *However, once again no writ of mandamus was issued.*

The unpublished order which petitioners attempted to cite is also inapposite and not controlling in the instant action. That case involved a claim that a statute on its face created an arbitrary and invidious classification. The instant action involves a claim that a statute is *applied* unconstitutionally.

In all the published opinions cited by petitioners *no writ of mandamus was issued.* The only case cited by petitioners where a writ was issued was in the *Valentino* unpublished order.[2] The fact that petitioners have had so much trouble citing authorities where a writ was actually issued illustrates the fact that a writ of mandamus is reserved for really extraordinary circumstances.

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2. In the *Valentino* v. *Howlett* opinion, supra (not cited by petitioners) the court refered to a writ of mandamus having been issued.

As previously discussed, petitioners have not presented a claim which requires a three-judge court. It is also respectfully submitted that the current trend of this Court has been to limit the use of the three-judge courts and the types of cases which require them to be convened is rapidly contracting. A single judge may now dismiss for lack of standing. *Gonzalez* v. *Automatic Employees Credit Union, supra.* Mr. Justice White in a concurring opinion in *MTM* v. *Baxley, supra,* stated that *Idlewild Bon Voyage Liquor Corp.* v. *Epstein,* 370 U.S. 713, 8 L. Ed. 2d 794 (1962) should be overruled and a single judge should be permitted to abstain.

This trend alone should prevent the issuance of the writ in all but the most flagrant instances of a single judge's abuse of discretion.

In the instant action it is clear that a three-judge court is not necessary, and obviously a writ of mandamus directing the Seventh Circuit to reconsider its denial of their first petition for mandamus is inappropriate. The fact that petitioners had such difficulty citing authority where the type of writ sought was actually issued indicates how rare the instances are when its use is proper. Petitioners have clearly failed to meet their required burden and the writ should be denied. This denial will not prejudice petitioners and will conserve judicial resources.

CONCLUSION

For the above stated reasons respondent, Michael J. Howlett, respectfully urges this Honorable Court to deny petitioners motion for leave to file their petition or in the alternative to deny the petition for writs of mandamus and prohibition.

Respectfully submitted.

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APPENDIX

APPENDIX

AFFIDAVIT

I, Jay L. Mesi, employed by the Office of the Secretary of State, do hereby affirm and attest that in July, 1975, I was working in the Vehicle Services Department and caused an Order of Revocation to be sent out to Do-Rite Auto Sales.

I hereby state that the above Order of Revocation was issued by administrative error and as such was never intended to be an Order of Revocation but rather a Notice of Hearing.

It is also the position of the Office of the Secretary of State that the word "finds" in Section 5-501(a) of the Illinois Vehicle Code is interpreted as affording an administrative hearing prior to a suspension of revocation of a dealers license.

Jay L. Mesi /s/

Subscribed and sworn to before me this 23rd day of January, A.D., 1976.

Patricia L. VanCamp, /s/

Notary Public.

Ill. Rev. Stat. (1975), Ch. 95½, § 2-118:

2-118. § 2-118. **Hearings.** (a) Upon the suspension, revocation or denial of the issuance of a license, permit or registration or certificate of title under this Act of any person the Secretary of State shall immediately notify such person in writing and upon his written request shall, within 20 days after receipt thereof, set a date for hearing and afford him an opportunity for a hearing as early as practical, in either the County of Sangamon or the County of Cook as such person may specify, unless both parties agree that such hearing may be held in some other county.

(b) At any time after the suspension, revocation or denial of a license, permit or registration or certificate of title of any person as hereinbefore referred to, the Secretary of State, in his discretion and without the necessity of a request by such person, may hold such a hearing, upon not less than 10 days' notice in writing, in the Counties of Sangamon or Cook or in any other county agreed to by the parties.

(c) Upon any such hearing, the Secretary of State, or his authorized agent may administer oaths and issue subpoenas for the attendance of witnesses and the production of relevant books and records and may require an examination of such person. Upon any such hearing, the Secretary of State shall either rescind or, good cause appearing therefor, continue, change or extend the Order of Revocation or Suspension, as the case may be.

(d) All hearings and hearing procedures shall comply with requirements of the Constitution, so that no person is deprived of due process of law nor denied equal protection of the laws. All hearings shall be held before the Secretary of State or before such persons

as may be designated by the Secretary of State and appropriate records of such hearings shall be kept. Where a transcript of the hearing is taken, the person requesting the hearing shall have the opportunity to order a copy thereof at his own expense.

(e) The action of the Secretary of State in suspending, revoking or denying any registration, license or permit or certificate of title shall be subject to judicial review in the Circuit Court of Sangamon County or in the Circuit Court of Cook County and the provisions of the "Administrative Review Act", approved May 8, 1945, and all amendments and modifications thereto, and the rules adopted pursuant thereto, are hereby adopted and shall apply to and govern every action for the judicial review of final acts or decisions of the Secretary of State hereunder.

Ill. Rev. Stat. (1975), Ch. 95½, § 5-501(a)(1)-(a)(6):

Denial, suspension or revocation of a license. (a) The license of a person issued under this Chapter may be denied, revoked or suspended if the Secretary of State finds that the licensee, or any officer, director, partner, manager or member of the licensee has:

1. Violated this Act;

2. Made any material misrepresentation to the Secretary of State in connection with an application for a license, junking certificate, salvage certificate, title or registration;

3. Been guilty of a fraudulent act in connection with selling, bartering, exchanging, offering for sale or otherwise dealing in vehicles, bodies and component parts;

4. As a new vehicle dealer has no contract with a manufacturer or enfranchised distributor to sell that new vehicle in this State;

5. Not maintained an established place of business as defined in this Chapter;

6. Failed to file or produce for the Secretary of State any application, report, document or other pertinent books, records, documents, letters, contracts, required to be filed or produced under this Chapter or any rule or regulation made by the Secretary of State pursuant to this Chapter;